

FEDERAL CIRCUIT COURT OF AUSTRALIA

Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 963

File number(s): PEG 180 of 2020

Judgment of: **JUDGE STREET**

Date of judgment: 7 May 2021

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – whether a bogus document was provided – whether an applicant needs to have knowledge of that bogus document – whether incorrect information was provided in the visa application – whether there was non-compliance by the applicant – whether the tribunal misapplied the relevant law – whether the tribunal failed to take into account relevant considerations – whether the applicant was denied procedural fairness by the Tribunal - no jurisdictional error found – amended application dismissed.

Legislation: *Migration Act 1958* (Cth) ss 5(a), 98, 99, s 100, 101(b), 103, 107, 109, 111, 140, 375A, 476, 486E

Number of paragraphs: 34

Date of hearing: 7 May 2021

Place: Sydney

Counsel for Applicants: Mr N Wong

Solicitor for Applicants: HRL Legal

Counsel for First Respondent: Mr P Hannan

Solicitor for the First Respondent: Minter Ellison

ORDERS

PEG 180 of 2020

BETWEEN: XIANBO CHEN
First Applicant

SHENGYUN SHI
Second Applicant

SHOU CHEN
Third Applicant

ZHAOHONG CHEN
Fourth Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE STREET

DATE OF ORDER: 7 MAY 2021

THE COURT ORDERS THAT:

- 1.
2. The amended application is dismissed.
3. The first and second applicant pay the first respondent's costs fixed in the amount of \$6,100.00
- 4.

REASONS FOR JUDGMENT

JUDGE STREET:

- 1 This is an application for a constitutional writ within the Court’s jurisdiction under s 476 of the *Migration Act 1958* (Cth) (“The *Act*”) in respect to the decision of the Administrative Appeals Tribunal (“the Tribunal”) made on 2 June 2020, affirming the decision of a Delegate of the first respondent (“the Delegate”) to cancel the first named applicant’s subclass 457 Temporary Work (skilled) visa (“the Visa”). The second applicant is the partner of the first applicant and the third and fourth applicants are children in respect of whom there has been a litigation guardian order made.
- 2 On 11 May 2017, the Delegate found that the visa should be cancelled in respect of a notice that had been issued under s 109 of the *Act*.
- 3 On 17 May 2017, the applicant applied for review. On 20 February 2020, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal summarised the background and also referred to a section 375A of the *Act* certificate. It is apparent that the applicant suffered no practical injustice by reason of the existence of that certificate or the information, the subject of the certificate that was of an administrative nature and was not material to the application for review. The Tribunal identified the issues relating to cancellation of the Visa, including whether the notice complied with s 107 of the *Act* and the power of cancellation under s 109 of the *Act*.
- 4 The Tribunal then turned to determine whether the notice complied with the requirements of s 107 of the *Act* and identified the aspects of which the notice alleged the applicant failed to comply. Firstly, the Tribunal found that the applicant failed to comply with s 101(b) and 103 of the *Act*. The Tribunal also found that the notice complied with the requirements of s 107 of the *Act*.
- 5 The Tribunal then turned to the issue of whether there was non-compliance under s 107 of the *Act*. In this regard, the Tribunal recorded that the applicant did not dispute the information set out in the notice, which indicated that an imposter and not the applicant had sat the IELTS test on 14 December 2013, and that the corresponding IELTS document and test details were provided in the visa application.

- 6 It is apparent that the Tribunal referred to the representative's submissions concerning the applicant applying for the visa through an agent. The Tribunal also recorded the submissions that identified that the applicant had never seen a copy of the IELTS test report provided to the Department. The Tribunal referred to the applicant's response that the applicant did not know what was provided in the visa application. The Tribunal also accepted the submission advanced in respect of a discrepancy as to the information that was provided by the applicant to the agent.
- 7 The Tribunal also made reference to the applicant's assertion that he was unaware of Australia's laws and, that if it was illegal, he would not have authorised the agent to do this. The Tribunal correctly identified that it is not necessary to establish that the applicant had knowledge that incorrect information or a bogus document had been provided by the agent for s 109 of the *Act* to be engaged. The Tribunal correctly identified s 98 of the *Act*, that if the applicant did not fill in the application form, he is taken to do so if he causes it to be filled in or it is otherwise filled in on his behalf.
- 8 The Tribunal also correctly identified s 99 of the *Act*, which provides that any information that is given on an applicant's behalf in relation to an application for a visa, as was done in this case, is taken for the purpose of s 101B of the *Act* to be an answer to a question. The Tribunal correctly identified the effect of s 100 of the *Act*, wherein an answer to a question is incorrect, even though the person that gave or provided the answer or caused the answer to be given or provided, did not know that it was incorrect.
- 9 The Tribunal also correctly identified s 111 of the *Act* and referred to the applicant's claims of having no knowledge of the information or documents provided. The Tribunal found that the information given in the visa application form about the applicant having sat an IELTS test is incorrect. The Tribunal found the applicant had not complied with s 101(b) of the *Act* as described in the notice. The Tribunal also found that the IELTS test's report provided with the application was a bogus document within s 5(a) of the *Act* and that the applicant had not complied with s 103 of the *Act* as described in the notice.
- 10 It was in these circumstances the Tribunal found there is non-compliance with s 101 and s 103 of the *Act* by the applicant, in the way described in the notice under s 107 of the *Act*. The Tribunal then turned to the issue of discretion as to whether the notice should be cancelled under s 109 of the *Act*. The Tribunal accepted that it was plausible that the applicant was not

aware that incorrect information about him having undertaken an IELTS test, had been provided with the Visa application form.

- 11 The Tribunal acknowledged that the applicant had limited English skills and may not have known Australian laws, however given the large sum of money he paid for the Visa, the Tribunal expects that the applicant would have made more of an effort to check what information was being provided on his behalf. The Tribunal considered that if the correct information had been known to Immigration, the applicant would not have been granted the s 457 Visa.
- 12 The Tribunal then considered the content of the document. The Tribunal made reference to it appearing that the applicant made limited efforts to check or verify what information or documents had been provided on his behalf. The Tribunal found that the applicant appeared to have blindly trusted the agent to take care of everything without much probing. The Tribunal referred to the issue of whether the decision to grant the Visa or the decision by Immigration to clear the visa holder, was based wholly or partly on the incorrect information or the bogus document provided and found that the decision to grant the applicant the subclass 457 Visa was in part based on the incorrect information and the bogus document.
- 13 The Tribunal turned to the circumstances in which the non-compliance occurred. The Tribunal acknowledged that the applicant may not have been aware of the non-compliance at the time it occurred. However, the Tribunal did not consider the applicant's conduct at the time of the non-compliance to be entirely blameless. The Tribunal referred to the present circumstances of the applicant and that the applicant's spouse had been living and working in Australia and wanted to continue to do so. The Tribunal turned to the issue as to when the applicant first became aware that incorrect information and the bogus document had been provided. The Tribunal referred to the Applicant's conduct in relation to another Visa application and an explanation provided by the agent as to the circumstances in which it was withdrawn. The Tribunal identified having some doubts about the Applicant's claim that he was not informed by the agency of the reasons why his Permanent Residency Visa application had been withdrawn.
- 14 The Tribunal referred to it being somewhat difficult to accept that the applicant would not have queried the agency about the nature of the problem that arose which required him to withdraw the application. The Tribunal found it was plausible that the applicant may not have

been fully informed of the nature of the unfavourable information. The Tribunal referred to any other instances of noncompliance referring to the circumstances in which the application was withdrawn and the time which elapsed since the noncompliance.

15 The Tribunal referred to the contributions made by the applicant to the community and acknowledged the consequences of cancellation of the visa. The Tribunal referred to the submissions advanced about pursuing the alleged person that the applicant claimed had advanced incorrect information. The Tribunal had regard to all the circumstances concluded that the visa should be cancelled and affirmed the decision under review.

16 The consequence of the decision was a statutory consequence under s 140 of the *Act* in respect of the second to fourth Applicants.

17 **BEFORE THE COURT**

18 These proceedings were commenced on 22 June 2020. On 3 December 2020 a registrar made Orders which relevantly provided:

2. By 4:00pm on 3 December 2020 the applicants shall file and serve any amended application upon which the applicants intend to rely, giving complete particulars of each Ground of review.

19 **THE GROUNDS**

20 An amended application was filed on 3 December 2020, the Grounds of which are as follows:

1. AAT has erred in law in finding that section 98 of the *Migration Act 1958* should apply to my client since my client was a victim of a criminal offence committed by the agent against section 6 of the *Crimes Act 1914*.

2. AA T has erred in law in finding that "it is not necessary to establish that the applicant had knowledge that incorrect information or a bogus document had been provided by the agent for s. 109 to be engaged" in that my client was the victim of a crime committed by the agent and it is therefore crucial to establish whether my client had knowledge that the incorrect information or a bogus document had been provided so as to determine whether my client had caused the bogus document that had been provided.

3. AA T has wrongly interpreted section 99 in conjunction with section 100 and 103 without taking the circumstance into consideration that the application was filled by the agent who in fact had committed an offence under section 6 of the *Crimes Act 1914* and there are two options to satisfy the English requirements prescribed by the Regulations 1994. There is no evidence to indicate that my client would cause to provide a bogus English document should he be informed that he could also meet the English Requirement if he met the English Exemption threshold.

4. AA T has failed to consider the crucial information that my client did not understand a word of English and no matter how hard he tried, the agent certainly would not fully inform him the true nature of the application form and therefore it must be wrong to find that it is my client had caused the bogus document to be provided to the Department.

5. AA T has failed to take into the relevant information into consideration that as to the client. Notwithstanding that there was no contract ever entered, should there be one, the contract must be voided as per the ratio decidendi set out in *Commercial Bank of Australia Ltd v Amadio*. Since no contract was ever entered between the agent and the client. AA T thus has erred in law in finding that section 99 in conjunction with section 100 and 103 applies to the applicant that the client has caused to be given or provide any information which is misleading.

6. AA T is a public authority. The client has legitimate expectation that AA T will live up to the client's legitimate expectation. Since AAT has made so many jurisdictional errors, AA T has disenfranchised the client's legitimate expectation which gives rise to another Ground for judicial review.

21 Following the making of that order, an affidavit was filed on 4 December 2020 by the Applicant. The content of the affidavit was irrelevant to the application for jurisdictional review by this Court and went to the merits of the circumstances surrounding the alleged excess of authority by the agent. The affidavit was one that could not be relevant to the application for jurisdictional review. Mr Wong, nonetheless, sought to press for the admission of the document because an order had been made permitting the applicant to file affidavit evidence.

22 Mr Wong's submission did not identify any relevant basis upon which the affidavit evidence could be admitted referable to the relief which he was seeking in this Court in respect of the Tribunal's decision

23 **GROUND 1**

24 In relation to Ground 1, the Court raised with Mr Wong why it disclosed an arguable or any jurisdictional error. There was no finding by the Tribunal that the applicant had been the victim of a criminal offence, let alone offence under a particular provision and Mr Wong indicated he wanted to refer it to a different provision of the Criminal Code.

25 On no view did Ground 1 comply with Order 2 made by the registrar on 3 December 2020, nor does Ground 2 identify any arguable case of relevant error. S 98 of the *Act* clearly had application to the applicant. That provision refers to the consequences of steps taken by a

person acting on behalf of the applicant. There can be no issue that the applicant had an agent who applied on his behalf for a visa that he took the benefit of the steps taken by the agent. There is no basis to find that the applicant was the victim of a crime and the proposition advanced does not identify any error in the conduct of the review by the Tribunal. This is not a case where there was any operative fraud upon the Tribunal by the agent. Ground 1 fails to identify any jurisdictional error.

26 No jurisdictional error is made out by Ground 1.

27 **GROUND 2**

28 In relation to Ground 2, whether or not this complies with Order 2 made by the registrar, it clearly does not identify any jurisdictional error. The Tribunal was clearly correct in identifying the consequences of s 100 of the *Act*. As summarised above, the Tribunal took into account the applicant's assertions as to the absence of knowledge concerning the incorrect information and bogus document in their discretion to cancel. The tribunal correctly identified that the limited knowledge of the applicant did not mean that there was no non-compliance as alleged in the notice, because of the statutory provisions referred to by the Tribunal summarised above. The Tribunal clearly took into account the evidence advanced by the applicant in respect of his state of knowledge as well as the applicant's assertion of ignorance in respect of the bogus document and the false answer. The victim of a crime proposition is unsupported by any such finding by the Tribunal and the bare assertion in the submission does not make out any excess of statutory power by the Tribunal in the conduct of the review or in its reasons. The Tribunal provided an evident and intelligible justification for the adverse exercise of the power to cancel, relevantly being not entirely blameless and the conduct of the applicant in relation to withdrawal of another visa application. It was not necessary for the Tribunal to find that the applicant knew that a bogus document and false answer were given to the Tribunal. The contention that this was crucial is incorrect. It was a relevant factor in the exercise of the Tribunal's discretion that the Tribunal took into account. The adverse exercise of the discretion was open for the reasons given by the Tribunal.

29 Nothing in Ground 2 makes out any jurisdictional error.

30 **GROUND 3**

31 In relation to Ground 3, Mr Wong was asked to take the Court to where in the Tribunal's reasons it was apparent that there had been some misconstruction or wrong interpretation of the provisions. Mr Wong was unable to do so. It is apparent the Tribunal correctly identified s 99 and s 100 of the *Act*. There is no proper basis to find that the Tribunal misapplied the statutory provisions. The extraneous reference to an alleged offence, which is not supported by any finding, does not make out any jurisdictional error as alleged in Ground 3.

32 The proposition in the last sentence of this ground appears to advance an argument that the applicant might have been able to meet the English test requirement. That does not mean there was no non-compliance as alleged in the notice. Further, it is apparent that the applicant had limited English, which the Tribunal took into account in considering the exercise of its discretion to cancel. The Tribunal also took into account and made express reference to the applicant's contention that he would not have permitted his agent to take forward an illegal step if he had been aware of that. Ground 3 does not identify any jurisdictional error.

33 **GROUND 4**

34 In relation to Ground 4, Mr Wong sought to develop an argument about the taking into account of an irrelevant consideration. Ground 4 does not reflect any such Ground. Insofar as Ground 4 refers to a failure to take into account the applicant's limited English, it is apparent from the Tribunal's reasons, as referred to above, that the Tribunal did do so. Mr Wong appears to have developed an argument said to somehow arise in relation to Ground 4 in respect of the agent's obligations under the Migration Code, none of which are particularised and none of which are an issue raised by Ground 4. Any non-compliance with the Migration Code by the agent does not give rise to any jurisdictional error by the Tribunal. Nor, as earlier identified, is there any basis to find there was any operative fraud upon the Tribunal.

35 For the reasons given by the Tribunal, it was clearly open to the Tribunal to make a finding that the applicant had caused the bogus document and false answer to be provided to the Tribunal. More than that, it is apparent that the applicant, as recorded in paragraph 27 of the Tribunal's reasons, did not dispute the significance of an imposter, and did not dispute that an imposter and not the applicant has sat the IELTS test, and that the details of the test were provided with the visa application as well as the test itself. The submission that the applicant

did not cause the bogus document to be provided is incorrect and contrary to the findings of the Tribunal that were open on the evidence. No jurisdictional error is made out by Ground 4.

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38 **GROUND 5**

39 In relation to Ground 5, Mr Wong appeared to accept that no argument about the absence of a contract or conduct was developed before the Tribunal.

40 In those circumstances, there cannot be a failure to take into account information that was not advanced before the Tribunal on behalf of the applicant. The reference to the contract and whether there was a contract does not identify any jurisdictional error. Nor does Ground 5 insofar as the requirements of Order 2 made on 3 September. The Tribunal correctly identified and applied the statutory provisions concerning the non-compliance with the notice as summarised above and made an adverse discretionary decision that was open to the Tribunal on the evidence. Further, the Tribunal correctly identified the statutory provisions and was correct to find that they had application to the applicant in the present case. No jurisdictional error is made out by Ground 5.

41 **GROUND 6**

42 Ground 6 appears to be a bare assertion of legitimate expectation, no doubt as a result of having read the respondent's submissions. Mr Wong submitted that in some way an error of procedural fairness, or a want of procedural fairness arose but did not identify the nature of the error or denial of procedural fairness. No particulars were provided to support any such error or denial and the bare assertion does not identify any want of procedural fairness. The bare assertion of jurisdictional errors without proper particulars is also incapable of identifying or establishing any such error. The Court has not found that any jurisdictional error by the Tribunal has been made out by the applicant. There is no apparent failure by the Tribunal to comply with the statutory requirements in the conduct of the review by the Tribunal. Nor is there any apparent failure to comply with the requirements of procedural fairness. On the face of the Tribunal's reasons, the applicant appears to have had a real and meaningful hearing before the Tribunal. Further, the Tribunal's reasons reflect a genuine

intellectual engagement with the applicant's claims and evidence. There is no circumstance that identifies how the alleged expectation identifies any error by the Tribunal other than a disagreement with the adverse outcome. That, in substance, invites merits review in respect of which this Court has no power.

43 No jurisdictional error is made out by Ground 6.

44 In these circumstances, the amended application is dismissed.

I certify that the preceding thirty-four (34) paragraphs are a true copy of the transcript of the published oral reasons for judgment of Judge Street delivered in open Court on 7 May 2021 and the parties were sent a sealed copy of the Court's orders.

Associate:

Dated: 26 July 2021